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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1221

JOSEPH CATALDO,

Petitioner

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1970

No.

JOSEPH CATALDO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Joseph Cataldo, respectfully prays that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, affirming petitioner's conviction for violating Title 18, United States Code, Sections 2314, 2315 and 371. (Receiving and selling securities of a value in excess of $5,000.00 moving in interstate commerce, knowing the same to have been stolen, and conspiracy to do the same.)

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit is reprinted in the Appendix to this petition.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1). The Court of Appeals Second Circuit, denied a motion for rehearing on the 15th day of December, 1970, but granted a stay of mandate and continued bail. (See Appendix)

Questions Presented

1. Whether the "standing" dilemma in connection with the Fourth Amendment, search and seizure problems, should be expanded to permit anyone adversely affected by an unlawful search and seizure to move to suppress evidence which the government seeks to introduce.

2. Whether petitioner received a fair trial in view of the fact that the sole witness against him admitted that Cataldo was innocent. The Trial Court, although informed of this fact and listening to a tape recording establishing it, refused to hold an evidentiary hearing.

Constitutional and Statutory Provisions Involved

The Fourth and Fifth Amendments of the United States Constitution and Sections 2314, 2315 and 371 of Title 18 of the United States Code are involved herein.

Statement of the Case

The indictment herein was predicated, *inter alia*, upon the theft of a quantity of securities from the brokerage firm of Rutner, Jackson & Gray, Los Angeles office. The Certificates were in the name of "Ruteo", a nominee of that

firm. The Certificates were mailed to Miami, Florida and thence to one Alan Segal in New York.

Segal, an admitted perjurer and liar, who had made false and inconsistent statements to the authorities, even about this very case, was the sole witness against Cataldo.

A threshhold issue involved in this case is whether a search and later seizure of evidence from the room of a co-defendant, Halikas, who shared an apartment with one Costas, was lawful. Then the further question is posed as to whether or not the seizure of evidence from Halikas' room could be the predicate of an indictment against petitioner Cataldo.

It is conceded that agents of the Federal Bureau of Investigation entered the apartment occupied by Halikas and Costas and demanded the right to look into Halikas' room. Halikas occupied a separate bedroom in this apartment which was used exclusively for himself.

Costas apparently made no objection to the search but nevertheless the F.B.I., after looking around the room, left.

They then returned on another day, searched again and then for a second time, departed (205A).*

Halikas' bedroom was only 8 feet deep and no entry was necessary to observe the fact that Halikas was absent. This was the primary reason for the F.B.I. entering the apartment, that is, to determine whether Halikas was in fact there.

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* Numerals in parenthesis refer to the Appendix used in the Court below.

Nevertheless, the agents entered the room and saw some crucial evidence such as an Atlantic Bank check, checks with the name "Emanual Santos" and other items. (205A; 207A and 212A).

This evidence unquestionably was essential to the conviction of the petitioner herein. (See Exhibits 70B, 218A).

After the two illegal entries and searches, the agents of the Federal Bureau of Investigation then finally secured a search warrant and obtained the important documents to which we have already adverted.

The papers thus seized were admitted against *all* of the defendants jointly on the trial, over vigorous objections. (T.T. 726)*

Prior to the judgment in this case, but after the verdict, the then attorney for the petitioner herein, (Mr. Sonenshine) advised the Court that a tape recording had been made by private investigators who had conversed with the main prosecution witness, Alan Segal, and Segal had admitted that petitioner Cataldo was not involved in the crimes charged in the indictment. The trial Court however refused to hold an evidenciary hearing. (T.T. 1111)

At the trial it was apparent that without the testimony of Alan Segal, there could have been no conviction whatsoever of Joseph Cataldo.

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* Numerals preceded by the letters "T.T." refer to the Trial transcript.

POINT I

The Federal Bureau of Investigation conducted an exploratory search of co-defendant's Halikas's room. The Circuit Court however indicated that Cataldo had no "standing" to object to this search and therefore, although the Trial Court admitted the evidence thus seized against all of the defendants at trial, no motion to suppress could be maintained by petitioner.

Agents of the Federal Bureau of Investigation, twice entered and searched the room of co-defendant Spiro William Halikas, without the benefit of any search warrant. Halikas occupied a room which exclusively belonged to him in an apartment jointly inhabited by himself and one Costas. Supposedly Costas consented to the agents of the F.B.I. entering the premises. It is obvious, however, that this was done in response to lawful authority and was in no event binding upon Halikas since Costas did not have control over his exclusive room. Only after two searches were completed and the incriminating evidence observed, did the F.B.I. finally secure a search warrant and then return to the apartment and seize the evidence.

It is respectfully submitted that not only was the entry of the agents gained by submission to lawful authority, but additionally, the speculative reason allegedly justifying Costas' consent, was to establish that he was not harboring a fugitive. [(*Cataldo*, slip opinion 201, footnote 2); *United States* v. *Botsch*, 364 Fed. 2d 542 (2 Cir. 1966) cert. denied, 386 U.S. 937 (1967), reh. denied, 386 U.S. 987 (1967).] Entry into the 8 foot room was not necessary for that purpose.

The bedroom which was served was used *exclusively* by Halikas and was only 8 feet deep. There was no need to go to his dresser and read the incriminating items thereon in order to determine whether or not Halikas was in fact in the room.

Certainly the F.B.I. did not think he was hiding on top of a dresser under a bank check.

The Court of Appeals inferred that Cataldo would not have had *standing* in any event to challenge the search and seizure. This of course raises the troublesome question as to whether or not a person against whom incriminating and illegally seized evidence is employed, must suffer without remedy because he happens not to have been the victim of the search itself.

The alleged "consent" of Costas was not like the situation in *Bumper* v. *North Carolina*, 391 U.S. 543 (1968), nor *Combs* v. *LaVallee*, 417 F. 2d 523 (2 Cir. 1969) where a defendant's mother had participated in the search of her son's own room to which she had consented.

Costas did not occupy a position of *loco parentis* vis a vis Halikas and thus could not truly consent in that capacity. In any event there does not appear to be any possible justification for the Federal Bureau of Investigation agents to have returned a second time without a search warrant, and again search and peruse the bedroom of Halikas and only then when they returned a third time did they finally arm themselves with a search warrant. (See *Cabey* v. *Mazurkiewitz*, 3 Cir. 1970, 7 Cr. L. 2433.)

Halikas himself sought to suppress the evidence and thus raised the issue clearly. The evidence was admitted against

all of the defendants, including Cataldo. "Standing" must be presumed in the absence of an issue having been raised in the Court below. Moreover, Cataldo had a right not to be convicted upon illegally seized evidence even if that belonged to a co-defendant since there was no severance granted.

See *Barnett* v. *United States*, 384 F.2d 848, 862 (5 Cir. 1967) and *Rosencranz* v. *United States*, 334 F.2d 738 (1 Cir. 1964).

We submit that re-analysis in light of *Stoner* v. *California*, 376 U.S. 483 (1964) is warranted.

The "standing" issue actually encourages "exploratory" searches since only the alleged victim may complain.

The Court below did not clearly state whether it rejected Cataldo's claims because he lacked "standing", or because Costas waived Halikas' right of privacy in order to disabuse the FBI of the notion that he was harboring a fugitive.

What this really amounts to is that the Court of Appeals and the District Court in this case have ruled that the government is free to conduct indiscriminate searches and seizures, with or without search warrants, with the assurance that the only persons against whom such evidence and the poisoned fruits thereof can not be used, will be the immediate victims of the lawless action. It has been held by other Circuit Courts that a contrary rule should prevail:

Compare:

Rosencranz v. *United States* (1st Cir. 1964), 334 F.2d 738 (rehearing);

Hair v. *United States* (D.C. Cir. 1961), 289 F. 2d 894;
Schoeneman v. *United States* (D.C. Cir. 1963), 317 F. 2d 173;
Diaz-Rosendô v. *United States* (9th Cir. 1966) (reversing itself on rehearing), 357 F. 2d 124;
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United States v. *Mullen*, 329 F. 2d 295 (5th Cir. 1964);
cf: *United States* v. *Masiello*, (2 Cir. 1970)—F. 2d—10/28/70.

Where the property seized is *not contraband* as in the case at bar, it appears that a distinction may be made. (Cf. *Anderson* v. *United States*, 318 U.S. 350, 356 (1943); *McDonald* v. *United States*, *supra*; *Gouled* v. *United States*, 255 U.S. 289, 312-313; *Amos* v. *United States*, 255 U.S. 313, 316-317; 62 Harv. L. Rev. 1229, 1230-31 (1949); 8 Wigmore Evid. §2184 (3 ed. 1940).

The Supreme Court of California banned illegally seized evidence as against third parties after reconsidering the rule.

See:

People v. *Martin*, 45 Cal. 2d 755; 290 P. 2d 855 (1955).

It would appear that the holdings in cases such as the one at bar have succeeded in turning back the clock and resurrecting the rule condemned by *Weeks* v. *United States*, 232 U.S. 383 (1914) and *Mapp* v. *Ohio*, 367 U.S. 643 (1961). It would seem that so far as the Government is now concerned, the rule of *People* v. *Defore*, 242 N.Y. 13, that evidence, otherwise admissible cannot be excluded solely be-

cause it was obtained by an unlawful search and seizure is the third party rule now. It is incredible that an anachronism of this sort should be permitted to effectively thwart and circumvent the Fourth Amendment, *Weeks*, and *Mapp* to a significant degree.

The policy of condemning lawless conduct by the government as a deterrent is now only applied to immediate victims and not to third persons or even to co-conspirators and law clients of a victim.

(See: *Mapp* v. *Ohio*, *supra*; *Wong Sun* v. *United States*, 371 U.S. 471; *Elkins* v. *United States*, 364 U.S. 206; *One Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693. See, too, *Rea* v. *United States*, 350 U.S. 214 (1956).)

The instant case and cases like it therefore has rendered almost nugatory all the important advances which have been wrought by federal tribunals and state courts recently in the field of search and seizure. The entire policy expressed by the Supreme Court condemning the lawless action of Federal authorities by mandating that the government could not gain from such lawless action, is now but a hollow echo with little true significance. (*Walder* v. *United States*, 347 U.S. 62, 64-65.)

In *McDonald* v. *United States*, 335 U.S. 451 (1948), the Court held that it would not condone the use of evidence obtained by government officials who had broken into a rooming house and had then peered through a transom of one of the rooms to obtain incriminating evidence. In that case, the defendant, McDonald, was present in his rented room with one Washington. The Court held that the evidence was unlawfully obtained as against not only McDon-

ald, but Washington, as well, despite the fact that Washington was not a resident of that particular house or room.*

In *McDonald*, the Court explained that it specifically was *not deciding* an important issue of "*standing*" which is again raised in the instant case and should be decided once and for all. Thus in *McDonald*, 335 U.S. at 456, the Court explained:

> "Even though we assume, *without deciding*, that Washington who was a guest of McDonald had no right of privacy that was broken when the officers searched McDonald's room without a warrant, we think that the denial of McDonald's motion was error that was prejudicial to Washington as well . . . [I]n this case . . . the unlawfully seized materials were the basis of evidence used against the co-defendant. If the property had been returned to McDonald it would *not* have been available at the trial." (Emphasis supplied)

In *Jones* v. *United States*, 362 U.S. 257 (1960), the issue of "*standing*" was enlarged beyond the limits of what it had been theretofore by indicating that rule 41(e), F. R. Crim. P. permitted a person accused of a narcotics violation to challenge the lawfullness of a search and seizure without admitting ownership or possession of the items involved. *Jones* clearly demonstrates that the Court is not so much concerned with actual ownership but rather with whether the government has acted in a lawless manner in obtaining the evidence, and whether justice will be subverted by permitting the government to profit from its own wrongdoing.

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* See concurrence of Mr. Justice Rutledge in *McDonald* favoring an absolute ban.

In this context, the Court decided *Mesarosh* v. *United States*, 352 U.S. 1. In *Mesarosh*, the Court explained (*id.* at 9, 14):

> "The dignity of the United States Government will not permit the conviction of any person on tainted testimony. The conviction is tainted, and there can be no other just result than to accord petitioners a new trial . . . This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the Federal Courts. If it has a duty to perform, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity . . . ['T]he untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts . . . The government of a strong and free nation does not need convictions based upon such testimony'."

In *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920) and *Wong Sun* v. *United States*, *supra*, this Court made it very plain that unlawfully seized evidence or evidence obtained in an unconstitutional manner *must "not be used at all."* In addition, this Court asserted that "knowledge gained by the government's own wrong cannot be used by it . . ." (*Silverthorne Lumber Co.* v. *United States*, 251 U.S. at 392; *Wong Sun* v. *United States*, 371 U.S. at 485).

In *Elkins* v. *United States*, *supra*, *Rea* v. *United States*, *supra*, *Wilson* v. *Schnettler*, 365 U.S. 381 (1961), *One Plymouth Sedan* v. *Penna.*, *supra*, and other cases, the Court condemned the use of illegally obtained evidence by the government in any manner be it by virtue of a so called

"silver platter" doctrine or by virtue of the participation of a federal agent in wrongdoing by state officers.

Yet in the case at bar, the government received evidence against Cataldo on a so called "silver platter" because it concededly could not possibly have proceeded against Cataldo *but for* the unconstitutional seizure of the Halikas records. In addition, it is significant that federal officers who participated in this lawless conduct were permitted to aid the government in the presentation of its case against the petitioner.

The vital aspects of this case disclose that the entire protection of the Fourth Amendment will be undermined and rendered almost nugatory unless something by this Court is done to impress the government with the fact that it may not benefit by its own lawless conduct and that indiscriminate searches and seizures may not be conducted nor may evidence based thereon be used for any purpose whatsoever, be it against the immediate victim or otherwise. Any contrary rule means that the government may take a calculated risk and seize evidence at will without search warrants with the assurance that it will only be precluded from prosecuting the immediate victim, but will always be able to prosecute everybody else against whom they may find incriminating evidence.

POINT II

The Supreme Court has clearly recognized that the purpose of the exclusionary rule of the Fourth Amendment is not to provide redress or punishment for past wrong, but to *deter* lawless enforcement of the law. Thus, to leave undisturbed the ruling of the Court that only immediate victims of unlawful searches and seizures have "standing" as "aggrieved" parties strongly tends to encourage the lawless enforcement of the law.

—A—

The trend of extending the exclusionary rule to any lawless conduct of the government as indicated by *Katz* v. *United States*, *Jones* v. *United States* and *McDonald* v. *United States* should be carried to its logical conclusion that never may the government benefit by its own wrong-doing.

In *People* v. *Defore*, 242 N.Y. 13, Judge Cardozo, then of the New York Court of Appeals, expressed the view of that court that even illegally seized evidence might be admissible since he saw no reason to exclude evidence merely because the constable "blundered."

The Court in *Weeks* v. *United States*, *supra* and *Mapp* v. *Ohio*, has expressly rejected such a view.

When it was apparent that the exclusionary rule could be circumvented by getting the evidence on a "silver platter" from another jurisdiction, the Supreme Court *closed that gap*. *Elkins* v. *United States*, *supra*.

When it appeared that federal officers might help other jurisdictions and thus indirectly benefit from their own wrong doing, the Court then again *closed this loophole*, too. (*Rea* v. *United States*).

It is now apparent that a *serious flaw still remains* to be corrected in the protection required under the Fourth Amendment. This is the "Pickwickian" interpretation given to "standing" as "aggrieved" parties. As now interpreted by some, but not all of the circuits, as already noted *supra*, the government is free to make any searches they desire in utter disregard of the Fourth Amendment if they so choose, not for the purpose of using such evidence against the immediate victim of the illegality, but rather to employ against third parties who were not the so called "immediate victims" of the lawless conduct.

Thus the government may now make "exploratory searches" of anyone it selects in the hope that perhaps evidence of some sort of illegality will be uncovered against third persons. *This strongly encourages lawless conduct since the government is tempted to "play the odds."* In other words, the prosecutor can determine to invade the home or office of "A", knowing that he will not be able to use the evidence thus seized against "A". Yet, if he believes that such evidence can be used to find something incriminating against "B", "C", "D", etc., it is certainly worth his while since the Court below has assured him that he will only lose "A", and to the lawless government agent, "A" may be expendable.

Therefore, if government agents are permitted to evade the exclusionary rule by obtaining evidence in violation of the rights of third parties, the deterrent effect of the Fourth Amendment is to that extent nullified.

In *People* v. *Martin, supra*, the California Supreme Court specifically rejected the use of evidence illegally obtained

against anyone, including third persons. Thus at 857 of 290 P. 2d, the California court recognized:

> "Thus, the role of the lower federal courts is based on the theory that the evidence is excluded to provide a remedy for a wrong done to the defendant, and that accordingly, if the defendant has not been wronged he is entitled to no remedy. Connolly v. Medalie, supra, 58 F. 2d 629, 630. In adopting the exclusionary rule, however, this court recognized that it could not be justified on that theory, People v. Cahan, 44 Cal. 2d 434, 443, 282 P. 2d 905, and based its decision on the ground that *'other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers.'* 44 Cal. 2d at page 445, 282 P. 2d at page 911. This result occurs whenever the government is allowed to profit by its own wrong by basing a conviction on illegally obtained evidence, and if law enforcement officers are allowed to evade the exclusionary rule by obtaining evidence in violation of the rights of third parties, *its deterrent effect is to that extent nullified.* Moreover, such a limitation virtually invites law enforcement officers to violate the rights of third parties and to trade the escape of a criminal whose rights are violated for the conviction of others by the use of the evidence illegally obtained against them." (Emphasis ours)

The Supreme Court has clearly recognized that the whole purpose of the exclusionary rule is not to provide redress for past wrongs, but rather to *deter* lawless conduct by government officials. In *Walder* v. *United States*, 347 U.S. 62 at 64-65, the Court succinctly explained:

> "The Government cannot violate the Fourth Amendment * * * and use the fruits of such unlawful conduct to secure a conviction. [Citation.] *Nor can the Government make indirect use of such evidence for its case* [citation], or support a conviction on evidence obtained through leads from the unlawfully obtained evidence. [Citation.] All these methods are outlawed, and convictions obtained by means of them are invalidated, because they encourage the kind of society that is obnoxious to free men." (Emphasis supplied)

What the Court lately said in *Jones* v. *United States* and *McDonald* v. *United States, supra,* is largely consistent with the holding of the California court. Indeed, the California Supreme Court based its own decision in *People* v. *Martin, supra,* largely on opinions of this Tribunal, citing especially *McDonald, Jones,* and *Walder* as well as other decisions of this Court.

Katz v. *United States,* 389 U.S. 285, *Chimel* v. *California,* 395 U.S. 752, *Silverthorne Lumber Co., supra, Wong Sun, supra,* as well as other cases have consistently held that unlawfully obtained evidence shall not only be used against the victim in a case, but that *it shall not be used at all.* This is meaningful only if properly enforced. If it may be used against everyone in the world except the so-called immediate victim, then there is little protection in the Fourth Amendment.

A recent comment in the Columbia Law Review, 66 Col. L. Rev. 400, 405 (1966) dealing with the case at bar quite aptly noted:

> "Recent devlopments in the treatment of the exclusionary rule, especially its elevation to the consti-

> tutional plane in *Mapp* v. *Ohio* and the increasing willingness to rest it upon the fourth amendment alone, *suggest a need to reevaluate the position of the third party.* In 1955, after reconsidering the rule, the California Supreme Court banned the introduction of illegally obtained evidence in trials of third parties. By avoiding the standing question, Judge Dimock was at least able to pinpoint the factors relevant to the reevaluation of the rule. *Hopefully,* the appellate courts and, ultimately, *the Supreme Court will also reach these considerations in reexamining and clarifying the scope of the fourth amendment's exclusionary rule."* (Emphasis ours)

See, *Bloustein, Privacy As An Aspect Of Human Dignity,* 39 N.Y.U.L. Rev. 962, 973-4 (1964).

This Court can purify the "polluted waters" of injustice by clarifying the thrust of the Fourth Amendment in reference to "standing" once and for all. It is incumbent upon this Court, not only in its role as the second highest tribunal in the land, but in its supervisory capacity over the district federal courts. This is especially so when the Circuit courts themselves are in disagreement on what is to be done.

—B—

There is a sharp conflict of opinion as well as substantial confusion among the Circuit Courts as to what the Court said and meant in *Jones* v. *United States* and *McDonald* v. *United States.* In other words, the question of "standing" as an aggrieved party under Rule 41(e) to object to an unlawful search and seizure remains an enigma.

A persual of the opinions of several of the Courts of Appeal in various Circuits indicate that there is a substantial disagreement as well as confusion as to what this Court meant in *Jones* v. *United States, supra,* and *Mc-*

Donald v. *United States, supra.* It would appear, for example, that the First Circuit and the Court of Appeals for the District of Columbia interpreted *McDonald* and *Jones* as holding that any use of evidence by the government which has been unlawfully obtained in violation of the immediate victim's constitutional rights may be barred from evidence upon a timely motion made by co-conspirators, co-defendants or the like. See, *Schoeneman* v. *United States* (App. D.C. 1963), 317 F. 2d 173; *Hair* v. *United States* (App. D.C. 1961), 289 F. 2d 894; *Rosencranz* v. *United States*, 334 F. 2d 738 (1st Cir. 1964); *Woods* v. *United States* (App. D.C.), 240 F. 2d 37 (1956) cert. denied 353 U.S. 941 (1957); *Nelson* v. *United States* (App. D.C. 1952), 208 F. 2d 505, 514, cert. denied 346 U.S. 827; *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631 (2 Cir. 1946); *Diaz-Rosendo* v. *United States* (9 Cir. 1966), 357 F. 2d 124; and *Plazola* v. *United States* (9 Cir. 1961), 291 F. 2d 256.

In the *Diaz-Rosendo* case, *supra*, it appears that the Ninth Circuit was considerably troubled over the thrust of this Court's opinion in *Jones* v. *United States* since it was constrained to overrule a three man bench by an en banc hearing. The Ninth Circuit apparently is of the opinion that the *Jones* case means that Rule 41(e) has been expanded but apparently limits such expansion to the situation where a co-defendant is actually present when an unlawful search and seizure is conducted as against the defendant.

Yet, in *Plazola* v. *United States, supra*, only distinguished in *Diaz-Rosendo*, the Ninth Circuit found that "constructive" possession of marijuana in a car other than that in which Plazola was driving was sufficient to warrant the

exclusion of the evidence as against Plazola because of its interpretation of *Jones* v. *United States*. It is of course possible that *Plazola* could be otherwise interpreted but this is the inescapable explanation which is inferred from *Diaz-Rosendo* v. *United States*, 357 F. 2d at 133.

In the instant case, the United States Court of Appeals for the Second Circuit did not discuss or consider the theory of *"constructive possession"* but contended itself with a decision which rested on the assumption that Cataldo had no rights to object to the introduction of the Halikas records against him merely because he was not the immediate victim of the unlawful search and seizure.

Katz v. *United States, supra*, held that the Fourth Amendment protects *"people", not "places"*.

The Supreme Court, in *Chimel*, extended the thrust of the Fourth Amendment. True it is that the searches here antedated that case. The retroactivity of *Chimel is* unresolved by the Supreme Court.

Even the Supreme Court noted that *Chimel* v. *California* did not mean that all searches prior thereto were proper if incident to a lawful arrest. On the contrary, it noted quite carefully in several cases that under traditional standards, applicable well before *Chimel*, searches without proper search warrants were unconstitutional, even if incident to arrests.

> *Van Cleef* v. *New Jersey*, 395 U.S. 814 (1969); *Shipley* v. *California*, 395 U.S. 818 (1969); *Colonnade Corp.* v. *United States*, 397 U.S. 72 (1970).
>
> Cf: *United States* v. *Rabinowitz*, 339 U.S. 56; *Harris* v. *United States*, 331 U.S. 145; *Kremen* v. *United States*, 354 U.S. 346, 7 and *Trupiano* v. *United States*, 334 U.S. 699.

See also:

Mancusi v. *Deforte*, 392 U.S. 364 (1968); *United States* v. *Kirschenblatt*, 16 F.2d 202 (C.C.A. 2); *United States* v. *Kleefeld*, 275 F. Supp. 761 (S.D.N.Y. 1967).

The First Circuit in *Rosencranz* v. *United States, supra*, was also (like the Ninth Circuit), obliged to grant a rehearing to resolve the question of "standing" in that case. On the rehearing, it held contrary to the Ninth Circuit, that an illegal search of a truck belonging to one Amorello which had been held to have been unconstitutional in violation of the Fourth Amendment gave "standing" to co-defendants to object to the introduction of evidence seized from that truck. This was based upon the First Circuit's interpretation of this Court's pronouncement in *Jones* v. *United States, supra.* In the cases cited from the District of Columbia Court of Appeals, such as *Schoeneman* v. *United States; Hair* v. *United States*, and others, it appears that the Court of Appeals interprets not only *Jones* v. *United States*, but *McDonald* v. *United States*, as well, as indicating that the broadest interpretation of the question of standing should be applied.

It is interesting to note that the Court apparently did not mention *McDonald* v. *United States, supra* in its decision and opinion in *Jones* v. *United States.* This is particularly surprising in view of the fact that the *McDonald* case is cited in the briefs submitted to the Court on the *Jones* appeal.

We have explained, *supra*, that one of the distinctions that have been suggested by the various Circuits is that perhaps the question of whether or not "contraband" is involved in an illegal search and seizure may be dispositive of whether or not such illegally seized evidence can be used

against co-conspirators, co-defendants or others. This was almost intimated in *Diaz-Rosendo* v. *United States, supra,* where marijuana was involved as well as *Bozza* v. *United States* (2 Cir. 1966) *supra,* where contraband was likewise involved.

The Court of Appeals for the District of Columbia in *Schoeneman* and *Hair* seems to agree with that interpretation, that is, that evidence illegally seized and ordered returned could never be used. This is likewise bolstered by this Court's opinions in *Silverthorne Lumber Company, supra,* and *Wong Sun, supra.*

POINT III

There is a serious question whether or not petitioner could have been found to have participated in the interstate transportation of the securities.

There is no evidence to support Cataldo's knowledge that the securities were transported into interstate commerce. The only nexus which connects Cataldo with this crime altogether, is the dubious testimony of the self-confessed perjurer, Alan Segal.

In *Todd* v. *United States,* 158 U.S. 278, 282, this Court observed:

> "It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act however wrongful can be punished under such a statute unless clearly within its terms. "There can be no constructive offenses, and, before a man can be punished, his case must be only and unmistakably within the statute." United States v. Lacher, 134 U.S. 624 . . . End. Interp. St. (2d Ed.) Sec. 329; Pm. Sedg. St. Const. Law, 280."

See Hart & Honore Causation in the Law, page 64.

This is not a case like *Pereira* v. *United States*, 347 U.S. 1, 9 where the Court found that it was "common knowledge" that the property would have to cross state lines.

POINT IV

We ask this Court to consider the post trial, presentence proceeding where it was disclosed that in an electronically recorded conversation with an investigator, Alan Segal, the sole incriminating witness against petitioner, had admitted lying about petitioner's role in this case. The Trial Court refused to set aside the verdict and declined to conduct a full evidentiary hearing.

The defense in the Trial Court called the Judges attention to the fact that a private investigator had recorded a conversation with the sole witness against Cataldo, Alan Segal who had admitted that he had lied about Cataldo's involvement in the crime (T.T. 1111).

We ask this Court to review that part of the transcript and to determine whether or not an evidentiary hearing should have been granted. The petitioner respectfully suggests that it was gross error not to have granted an evidentiary hearing in view of this testimony.

CONCLUSION

The writ of certiorari should be granted

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioner

APPENDIX

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 110-11—September Term, 1970.

(Argued September 17, 1970 Decided October 26, 1970.)

Docket Nos. 34644, 34659

UNITED STATES OF AMERICA,

Appellee,

—against—

JOSEPH CATALDO and JAMES LUCAKOS, a/k/a JAMES LUCAS, T/N JAMES LUCAKAS,

Defendants-Appellants.

Before:

WATERMAN, MOORE and KAUFMAN,

Circuit Judges.

Appeal from the judgments of conviction entered January 27, 1970, in the United States District Court for the Southern District of New York, after a trial held before Tyler, *Judge*, and a jury, for receiving and selling in interstate commerce stolen securities of a value in excess of $5,000, knowing them to be stolen, in violation of Sections 2, 2314 and 2315, and for conspiring to violate 18 U.S.C. § 371.

Judgment affirmed.

MOORE, *Circuit Judge*:

Joseph Cataldo (Cataldo) and James Lucakos (Lucas)[1] appeal from judgments of conviction after trial to court and jury of the crimes of conspiracy and receiving and selling securities of a value in excess of $5,000 moving in interstate commerce, knowing the securities to have been stolen, 18 U.S.C.§§ 2, 371, 2314 and 2315. Count 1 charged a conspiracy by Cataldo, Lucas, and four other defendants Spiro Williams Halikas, Alan Irving Segal, William Fiske Wright, Jr., and Robert Bialkin to violate Sections 2, 371, 2314 and 2315. Counts 2 and 3 were substantive counts directed against Cataldo, Lucas, Halikas, Segal and Wright and alleged the receipt and sale of the stolen securities. Segal and Wright pleaded guilty; Halikas was convicted and did not appeal.

Little purpose would be served by a detailed account of the machinations of the conspirators in their ill-fated efforts to dispose of their booty. The facts, therefore, will be confined to a resume of those relevant to their respective appellate arguments and somewhat enlarged as appropriate to each point.

On November 15, 1967, $488,000 worth of securities were stolen from the Los Angeles office of the brokerage firm of Rutner, Jackson and Gray. The certificates were all in the nominee name "RUTCO" of that firm. The certificates were sent to Miami and from there were mailed to Segal in New York. Segal then met with Cataldo, Lucas and Halikas to discuss the question of how to dispose of the securities. After several additional meetings, Cataldo di-

[1] Defendant Lucas is also known as James Lucakos and was indicted as James Lucakas but apparently prefers the name Lucas.

rected Halikas in a series of actions designed to accomplish this end. After one effort to sell the securities proved unsuccessful, the securities were delivered to Schweickart and Company for sale. Unknown to the conspirators, Schweickart was the New York correspondent of Rutner, Jackson and Gray. Recognizing the "RUTCO" nominee name, the firm investigated and discovered that the securities were the ones stolen from Rutner, Jackson and Gray. The F.B.I. then sought Halikas in order to arrest him. Agents appeared at his apartment and his roommate, Peter Costas, agreed to let them enter the apartment for the purpose of determining whether or not Halikas was there. He was not in fact there at the time. The agents checked again the next day. On both occasions, the agents entered Halikas' room, with Costas' consent, and saw in plain view certain documents which related to this crime, including a bank check used in furtherance of the conspiracy. On the basis of these observations, the agents obtained a search warrant. They then returned to the apartment for a third time, served the warrant and seized the papers.

Since guilt seems to be a secondary consideration to both appellants, their claims for reversal are limited. Cataldo objects to (1) a search of Halikas' apartment allegedly without authorization or consent and (2) inadequate instructions to the jury as to their consideration of Segal's credibility. Lucas challenges the insufficiency of the evidence as a matter of law.

Cataldo

Cataldo objects to the admission into evidence of papers seized by the F.B.I. in the course of the search of Halikas'

apartment. We believe that the search and seizure was entirely justifiable. There is ample evidence to support the conclusion that the apartment was jointly occupied by Costas and Halikas as joint tenants and that Costas consented to the first two visits made to the apartment by the F.B.I. agents. Cataldo questions the authority of Costas to consent to an entry by federal agents into Halikas' room, since the evidence did show that Halikas and his co-tenant occupied separate bedrooms. Where, however, two or more persons occupy a dwelling place jointly, the general rule is that one joint tenant can consent to a search of the dwelling place. *Carlton* v. *United States*, 391 F.2d 684, 686 (8th Cir. 1968), *cert. denied* 394 U.S. 1014 (1969); *United States* v. *Kellerman*, —— F.2d —— (2d Cir. July 24, 1970); *United States* v. *Mackiewicz*, 401 F.2d 219, 223-24 (2d Cir.), *cert. denied* 393 U.S. 923 (1968); *Weaver* v. *Lane*, 382 F.2d 251 (7th Cir. 1967), *cert. denied* 392 U.S. 930 (1968); *Drummond* v. *United States*, 350 F.2d 983, 989 (8th Cir. 1965), *cert. denied* 384 U.S. 944 (1966); *Burge* v. *United States*, 342 F.2d 408, 413 (9th Cir.), *cert. denied* 382 U.S. 829 (1965). The evidence here indicates joint control over the entire apartment.[2] This is not a situation such as *Stoner* v. *California*, 376 U.S. 483 (1964) where a hotel guest occupied a room which was under lock and key and where the hotel manager who consented to the search was not jointly occupying the premises. In *Frazier* v. *Cupp*, 394 U.S. 731, 740 (1969), the court decided that where two persons used the same duffle bag but each had his own com-

[2] Halikas' roommate had a valid right to prove to the agents that he was not harboring a fugitive. This provides an additional justification for the agents' presence in the apartment. See *United States* v. *Botsch*, 364 F.2d 542 (2d Cir. 1966), *cert. denied* 386 U.S. 937 (1967), *reh. denied* 386 U.S. 987 (1967).

partment, the consent of one of the two users would be sufficient to justify the search of the entire bag. The court in *Frazier* found that the non-consenting user "must be taken to have assumed the risk that [the consenting user] would allow someone else to look inside." Halikas here assumed a similar risk.

In view of the Costas consent, we find it unnecessary to decide whether the agents' examination of the premises on December 20 and 21, 1967 constituted a search on these occasions.

The Government has argued forcefully that under *Alderman* v. *United States*, 394 U.S. 165, 171-76 (1969), appellant Cataldo has no standing to challenge the constitutionality of the search of the Costas-Halikas apartment. Cataldo contends that the Government failed to raise this point at trial and thus waived the lack of standing argument; but it was the defendants who objected to the introduction of the evidence pursuant to the search warrant. During the trial and before receiving the challenged evidence, the trial Court gave the defendants ample opportunity to develop the facts relating to the alleged search and seizure. His conclusions that Costas' consent to the search was freely given, that Costas was a joint tenant of the apartment, and that the F.B.I. agent who entered Halikas' room did not touch or search anything therein are supported by the evidence and the law applicable thereto. Furthermore, Cataldo had no status as an occupant or co-tenant of the premises. At best he was only a friend of one or both of the occupants. The status of Cataldo as a co-conspirator did not give him a possessory interest in the papers seized and, therefore, he was not entitled to a

reasonable expectation that they would be kept private. *Jones* v. *United States*, 362 U.S. 257 (1960); *Katz* v. *United States*, 389 U.S. 347 (1967); *Mancusi* v. *DeForte*, 392 U.S. 364 (1968). We believe that the situation is clearly governed by *Alderman* v. *United States*, *supra*, and that Cataldo has no standing to challenge the search of the Costas-Halikas apartment.

As to the charge, Cataldo contends that the Court erred in failing to instruct the jury in the manner requested by defense counsel, as follows:

> "[I]f they have a reasonable doubt as to the truthfulness of Segal's implication of Cataldo they should acquit Cataldo because there is no other evidence other than the version offered by the defendant or the witness Segal."

The Court reviewed Segal's unsavory record including his lying thrice to the Grand Jury and the F.B.I. on different occasions and his plea of guilty in this case and charged that the jury should "consider Segal's testimony with scrupulous care." *United States* v. *Mattio*, 388 F.2d 368, 370 (2d Cir.), *cert. denied* 390 U.S. 1043 (1968); *United States* v. *Agueci*, 310 F.2d 817, 833 (2d Cir. 1962), *cert. denied* 372 U.S. 959 (1963); *United States* v. *Vita*, 294 F.2d 524, 526 (2d Cir. 1961), *cert. denied* 369 U.S. 823 (1962). The defendants were entitled to no more. In addition to Segal, the jury saw and heard all three defendants who categorically denied any participation whatsoever in the crimes charged. The Court instructed that it was for the jury to determine his credibility in the light of his record. This they did—adversely to the defendants.

Lucas

Lucas challenges his conviction on the grounds that there was insufficient evidence to support his conviction. We reject this argument. Although his share of the proceeds was to be smaller than the share others were to get, the fact that he was to get something indicates more than mere "generosity" as Lucas' counsel would have us believe. Lucas was also present at many meetings in which plans were discussed, bought "Nu-Skin" to hide Halikas' fingerprints and suggested bribing a New York Supreme Court clerk in order to get a blank certificate of doing business. These acts are sufficient to justify a jury verdict finding that Lucas participated in the conspiracy.

The convictions are affirmed.

Order Granting Stay of Mandate

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

34987

[SAME TITLE]

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate and for bail pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellant, Cataldo Calegro DeLutro.

Upon consideration thereof, it is

Ordered that

1. The petition to stay the issuance of the mandate is granted subject to the provisions of FRAP 41(b).

2. The petition in all other respects is denied.

(Signature)

Dec. 15, 1970

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

34987

[SAME TITLE]

A petition for a rehearing containing a suggestion that the motion be reheard en banc having been filed herein by counsel for the appellant, Cataldo Calegro DeLutro, and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD
Chief Judge

Dec. 15, 1970